

1 The Honorable Michelle L. Peterson
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

13 MAKENZIE and ERIC ZUERN, on behalf of) Civil Action No.: 3:19-cv-06235-MLP
14 themselves and all others similarly situated,)
15 Plaintiffs,) **REPLY IN SUPPORT OF DEFENDANTS'**
16 vs.) **MOTION TO DISMISS**
17 IDS PROPERTY CASUALTY INSURANCE)
18 COMPANY; AMERIPRISE INS. CO.; and) NOTE ON MOTION CALENDAR: February
19 AMERIPRISE AUTO & HOME INS.,) 21, 2020
20 Defendants.) ORAL ARGUMENT REQUESTED
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1 **I. INTRODUCTION**

2 This case turns on the application of two Washington insurance regulations, WAC 284-30-
 3 320 (Subsection 320) and WAC 284-30-391 (Subsection 391). Subsection 391 requires insurers to
 4 compensate insureds for the “actual cash value” of totaled vehicles. Subsection 320 defines “actual
 5 cash value” as “fair market value.” IDS moved to dismiss because plaintiffs have not alleged and
 6 cannot allege that IDS breached its duty to provide them with the fair market value of their vehicle.
 7 In response, plaintiffs simply refuse to discuss fair market value. Neither the term nor the concept
 8 appears in their opposition brief. That is fatal.

9 Rather than grappling with the critical regulatory definition, plaintiffs repeatedly argue that
 10 Subsection 391(4)(b) instructs insurers calculating actual cash value to consider “only [the] options,
 11 mileage, or condition” of comparable vehicles. But Subsection 391(b)(4) does not include the word
 12 “only.” The provision does not purport to set forth an exhaustive list of factors for insurers to
 13 consider in determining actual cash value, and it certainly does not purport to trump the key
 14 regulatory principle that insurers are to compensate insureds for the fair market value – neither more
 15 nor less – of their vehicles. Plaintiffs have accordingly failed to state a claim based on IDS’ alleged
 16 failure to pay the actual cash value of their car.

17 Plaintiffs’ second theory of liability – that IDS breached its duty under Subsection 391(b)(4)
 18 to base offers on “itemized and verifiable dollar amounts” – is equally defective as a matter of law.
 19 Consistent with Subsection 391, IDS provided plaintiffs with a valuation report containing detailed
 20 financial information itemizing each discount and upward adjustment it made in determining the
 21 actual cash value of their vehicle; this included dollar figures corresponding to the typical
 22 negotiation adjustment applied to five comparable vehicles. Plaintiffs suggest that IDS was required
 23 to go beyond this and to provide the raw data from which the typical negotiation adjustment was
 24 derived, but they cite no authority supporting that proposition. As significantly, plaintiffs fail to
 25 plead facts showing that they suffered damages in connection with the purportedly missing data.
 26 Critically, again, plaintiffs do not contend that IDS paid them less than the fair market value of their
 27 vehicle – which is all they are entitled to under their insurance policy and Washington law.

28 Finally, as to the two defendants other than IDS – Ameriprise Insurance Company and

1 Ameriprise Home and Auto Insurance – plaintiffs argue that a cover letter authenticating the
 2 insurance policy “indicates a common authorship” of that contract as to all three defendants.
 3 Plaintiffs are wrong. The insurance policy on which their claims depend is clear on its face: The
 4 only contracting party is IDS. And while plaintiffs note that the three entities have certain
 5 connections with one another, they cite no legal principle – corporate veil-piercing, respondeat
 6 superior or anything else – that makes the three liable for one another’s contractual obligations or
 7 alleged torts on the basis of those connections. Plaintiffs have not pled a claim against any
 8 defendant in this case.

9 **II. ARGUMENT**

10 **A. IDS Did Not Breach The Policy Or Washington Law.**

11 **1. Washington Law Permits Insurers To Make All Adjustments Necessary
 12 To Ascertain A Vehicle’s Fair Market Value.**

13 Plaintiffs contend that IDS’ use of a typical negotiation adjustment to determine the actual
 14 cash value of comparable vehicles is “inappropriate” and “unauthorized” under Subsection
 15 391(4)(b). IDS showed in its opening brief that this claim cannot be reconciled with the language of
 16 Subsections 391 and 320. These provisions require insurers to compensate insureds in an amount
 17 equal to the fair market value of total-loss vehicles. WAC 284-30-391(2) (“[t]he insurer may settle a
 18 total loss claim by offering a cash settlement based on the actual cash value of a comparable motor
 19 vehicle”); WAC 284-30-320 (“[a]ctual cash value’ means the fair market value of the loss vehicle
 20 immediately prior to the loss”). Fair market value, in turn, means the amount a willing buyer would
 21 pay a willing seller. (Mot. at 5 (citing authorities).) The price actually paid by a buyer – and not the
 22 advertised or offering price posted by a seller – is therefore the touchstone.

23 Plaintiffs respond that IDS has “misconstrued” their allegations, and that their claim is
 24 consistent with Subsection 391 because they do not dispute that insurers may adjust for options,
 25 mileage, or conditions. Opp. at 7. But there is no misconstruction here. Plaintiffs’ position is that
 26 insurers may make adjustments *only* for options, mileage and conditions. Opp. at 1-2. IDS’ position
 27 is that Washington’s insurance regulations require insurers to determine a vehicle’s fair market
 28 value, and that to do so, insurers and third-party valuation vendors will often need to look at factors

1 *beyond* options, mileage and condition. (Mot. at 5-9.) The issue on IDS' motion to dismiss is
 2 whether plaintiffs' or IDS' position is consistent with the regulatory text.

3 Plaintiffs, as noted largely ignore the text. Plaintiffs correctly observe that "actual cash
 4 value" is not defined in the insurance policy and hence must be interpreted in accordance with the
 5 regulatory text – but then entirely fail to address Subsection 320, which explicitly defines the term.
 6 (Opp. at 7.) Subsection 320 is dispositive: In determining the actual cash value of a comparable
 7 vehicle, insurers must ascertain how much a willing buyer would have paid a willing seller for that
 8 vehicle. Plaintiffs similarly fail to address defendants' other textual arguments, which show (1) that
 9 Subsection 391(b)(4) does not on its face limit insurers to considering options, mileage and
 10 condition, and (2) that any such limitation would lead to a situation in which "actual cash value"
 11 would have different meanings in different provisions of Subsection 391. (Mot. at 7-9.)

12 Rather than dealing with the applicable regulatory framework, plaintiffs repeatedly state that
 13 Subsection 391 "expressly provide[s] that to achieve comparability, insurers must *only make*
 14 deductions or additions for options, mileage, or condition." (E.g., Opp. at 2 (emphasis added).) But
 15 the word "only" does not appear in Subsection 391(4)(b). By contrast, other provisions of the
 16 insurance regulations – including provisions within Subsection 391 – do use the word "only" when
 17 the intent is to denote an exhaustive list. E.g. 284-30-391(5) (mandating that insurers must adjust a
 18 total loss settlement "through the following methods *only*") (emphasis added); WAC 284-30-395(1)
 19 (enumerating the bases for denying a claim under Personal Injury Protection coverage and
 20 specifying that "[t]hese are the *only* grounds for denial, limitation, or termination") (emphasis
 21 added). These provisions make clear that the drafters of the insurance regulations understood how to
 22 make a list of factors exhaustive, and that they did this explicitly where they intended to do so. The
 23 drafters did not do so in Subsection 391(4)(b).

24 For the same reason, plaintiffs' argument finds no support in the Washington Supreme
 25 Court's decision in *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn. 2d 1 (2018) (Opp. at 6-7).
 26 Indeed, *Durant* shows by way of contrast why plaintiffs' regulatory argument in this case is wrong.
 27 The regulatory provision at issue in *Durant* was 284-30-395(1); as noted, this provision both
 28 enumerates the factors an insurer may consider in denying a Personal Injury Protection claim and

1 specifically provides that these factors “*are the only grounds for denial*” of such a claim. 191 Wn.
 2d at 403-04 (emphasis in original). Based on that provision, the Supreme Court held that the
 3 insurer was not entitled to limit coverage based on factors beyond those enumerated in the
 4 regulation. *Id.* at 406-07. Subsection 391(4)(b), by contrast, contains no such limiting language.

5 In arguing that the list of options, mileage and conditions is exclusive, plaintiffs also
 6 overlook the limited function of that list within Subsection 391(4)(b). Subsection 391(4)(b) directs
 7 insurers to consider these three factors “when determining comparability.” WAC 284-30-391(4)(b).
 8 The typical negotiation is not used to determine how two vehicles compare to one another. Insurers
 9 use the typical negotiation adjustment to determine the fair market value of the comparable vehicles
 10 *before* comparing those vehicles to the insured vehicle.¹

11 Plaintiffs also seek to invoke broader policy considerations, arguing that if insurers were
 12 permitted to consider typical negotiation adjustments, this would give them “unfettered” or
 13 “unbridled” license “to enlist any deduction they wanted.” (Opp. at 1, 6.) This is plainly untrue.
 14 The WAC provisions governing total-loss vehicles mandate that insurers must pay – and insureds are
 15 entitled to receive – amounts corresponding to the fair market value of the insured vehicle. *Supra* at
 16 2. Any deduction that does not align with fair market value would accordingly be impermissible.
 17 An insurer’s authority to consider factors other than options, mileage and condition therefore is
 18 “fettered” – it is clearly bounded by the concept of fair market value. Critically, again, plaintiffs do
 19 not address that concept. They do not dispute that adjusting for negotiation discounts is part of a fair
 20 market value determination. Nor do they allege that the amount they accepted for their particular
 21 vehicle was anything less than its fair market value. Their inability to make any such allegation
 22 belies their argument that IDS is advocating an “unbridled” right to reduce the value of totaled
 23 vehicles based solely on an insurer’s whim.

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25 ¹To value an automobile, two data points are needed: the selling price for a comparable automobile and the dollar value
 26 of the differences between that comparable vehicle and the vehicle being valued. Because the selling prices of individual
 27 automobiles are not readily available, the typical negotiation adjustment is used to derive an estimate of the selling price
 28 (or fair market value) of the comparable vehicle. Once the selling price of the comparable vehicle has been established,
 the insurer or vendor is then able to compare the vehicle being valued to the comparable vehicle by accounting for
 differences between the two in options, mileage and condition. Subsection 391(4)(b) by its plain language regulates the
 latter part of the analysis – comparing the two vehicles as to options, mileage and condition – but does not preclude
 insurers from performing the former part of the analysis – deriving the sale price of the comparable vehicle.

1 Finally, IDS explained in its opening brief that the outcome plaintiffs seek – in which
 2 insureds would be paid more than the fair market value of their vehicles – would be inconsistent
 3 with overarching principles of Washington insurance law. (Mot. at 9.) Under Washington’s
 4 indemnity principle, insureds are entitled only to the amount of their losses, and not to additional
 5 windfalls. *Dombrosky v. Farmers Ins. Co.*, 84 Wn. App. 245, 259 n.4 (1996)). Any other result
 6 would be “inimical to the public interest.” *Gossett v. Farmers Ins. Co.*, 133 Wn. 2d 954, 968 (1997).
 7 Plaintiffs ignore this argument too. But this general policy, like the specifically-applicable
 8 regulatory text, is fatal to their claim. Plaintiffs have not alleged facts showing that IDS breached
 9 the insurance policy or any other legal duty by applying a negotiation adjustment in determining the
 10 actual cash value of comparable vehicles.

11 **2. IDS’ Deductions Are Verifiable.**

12 Plaintiffs’ second theory of liability is that by applying a typical negotiation discount, IDS
 13 breached its obligation to base its offer on “verifiable” amounts. IDS showed in its opening brief
 14 that this theory fails because plaintiffs cite no facts in support of their conclusory allegation that the
 15 typical negotiation adjustment is not “verifiable.” The Autosource report IDS provided to plaintiffs
 16 in offering to settle their claim showed that the vendor applied a 6 percent typical negotiation
 17 adjustment to each of five comparable vehicles in order to determine their fair market value. (Dkt.
 18 No. 16-3 at 5-7.) The term “verifiable” means capable of being checked for accuracy, and plaintiffs
 19 have alleged no facts suggesting that the vendor’s 6 percent calculations are based on fictitious data
 20 or cannot be checked for accuracy. (Mot. at 9-10.)

21 Plaintiffs respond that the question of whether the typical negotiation adjustment is verifiable
 22 is a factual issue unsuitable for resolution on a motion to dismiss. But the issue here is that plaintiffs
 23 have pled *no* facts demonstrating that the challenged adjustment is unverifiable: While plaintiffs
 24 contend that IDS’ motion raises a “factual dispute,” they fail to identify any such dispute. Plaintiffs’
 25 citation to *Lundquist v. First Nat’l Ins. Co. of Am.*, No. 18-5301, 2018 WL 2949470 (W.D. Wash.
 26 June 13, 2018), does not establish a factual dispute either. In *Lundquist*, Judge Bryan employed a
 27 definition of “verifiable” nearly identical to the definition IDS cited in its opening brief. *Id.* at *4 (a
 28 figure is “verifiable” if it is “capable of being established as accurate”); (Mot. at 9 (““verifiable”

1 means ‘[a]ble to be checked or demonstrated to be true, accurate or justified”’)). Plaintiffs, again,
 2 cite no facts showing that Autosource’s 6 percent calculations cannot be checked.²

3 Plaintiffs go on to suggest that IDS should have included the raw data underlying the 6
 4 percent figure. But *Lundquist* does not require that either. The insurer in that case had adjusted
 5 three vehicles for comparability by applying an identical adjustment to each and refusing to provide
 6 any basis for that adjustment. 2018 WL 2949470, at *1. On these facts, the court held that the
 7 plaintiff had stated a claim under the “verifiable” requirement – together with the requirement in the
 8 same regulatory provision that deductions be “itemized” – because the insurer had made it
 9 impossible for the plaintiff to understand which factors, and in which amounts, were behind the
 10 blanket adjustment. *Id.* at *4 (noting that the term “‘verifiable’ would be rendered meaningless”
 11 without “disclosure of the amount” of the reduction). That is entirely distinct from the situation
 12 here, where the Autosource report lays out the amount and bases for all adjustments – both the
 13 adjustments made to account for difference in options, mileage and condition and the typical
 14 negotiation adjustment. (Dkt. No. 16-3 at 5-7.)

15 Plaintiffs cite nothing to support their claim that IDS was also required to provide the
 16 underlying raw data from which the 6 percent adjustment was derived. Furnishing such data –which
 17 could run to thousands of pages for every totaled vehicle – would be impracticable for insurers and
 18 burdensome to insureds. It is hardly surprising that plaintiffs are unable to find authority mandating
 19 a result that would hamper rather than facilitate meaningful disclosure from an insurer to an insured.

20 Finally, plaintiffs contend that the typical negotiation adjustment “is arbitrary and contrary to
 21 customary automobile dealer practices and inventory management.” (Opposition at 8-9.) According
 22 to plaintiffs, list prices for used cars are typically “priced to market” and are thus equivalent to sales
 23 prices. *Id.* The Court should reject this argument. Plaintiffs cite no factual allegations in their
 24 complaint that support or even relate to it.

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26 ² The *Lundquist* order plaintiffs cite was vacated on June 13, 2018, the same day the order was issued. This appears on
 27 the face of the order. A month later, Judge Bryan issued a similar order with an additional discussion noting that the
 28 parties had declined to certify the issue to the Washington Supreme Court. *Lundquist v. First Nat'l Ins. Co. of Am.*, No.
 18-5301, 2018 WL 3344791 (W.D. Wash. July 9, 2018). Plaintiffs’ citation to a vacated decision is improper and creates
 unnecessary confusion and burden on the Court and counsel.

3. IDS Itemized Its Adjustments.

Plaintiffs also argue in passing that the typical negotiation adjustment at issue here was “not itemized,” and hence was purportedly in violation of the requirement in Subsection 391(4)(b) that insurers provide “itemized” amounts. (*E.g.* Opp. at 2.) But plaintiffs have pled no facts showing that IDS failed to provide insureds with itemized amounts. Meanwhile, the Autosource report – which is properly before the Court – plainly shows that the typical negotiation adjustment *was* “itemized.” The report breaks out that adjustment for each of the five comparable vehicles, and lists the dollar amounts produced by that adjustment for each of the five. (Dkt. No. 16-3 at 5-6). That is “itemization” under any definition.

B. Plaintiffs Fail To Plead Damages.

IDS showed in the opening brief that plaintiffs have failed to plead damages: Plaintiffs do not dispute that they received \$19,224 for their vehicle and do not contend that the fair market value of that vehicle was greater than \$19,224. (Motion at 10-11.) In response, plaintiffs argue that “Defendants’ actions undervalued their total loss claim by approximately \$1,100,” which they claim is the approximate amount of the typical negotiation adjustment applied to the five comparable vehicles. (Opposition at 9.)

Here again, plaintiffs simply refuse to address the issue of fair market value. But under Washington law, as discussed, plaintiffs are entitled to no more than the fair market value of their vehicle, and plaintiffs do not contend that they received less than that amount. Plaintiffs accordingly fail to plead damages in connection with their first theory of liability – that the typical negotiation adjustment was in itself improper. Plaintiffs also fail to plead damages in connection with their second theory of liability – that the adjustment was not “verifiable.” Plaintiffs do not allege that if IDS had furnished them with the raw data to which they suggest they were entitled, this would have yielded an amount greater than they received. In the absence of any such allegations, plaintiffs have not plausibly alleged that they are entitled to relief under any of their claims.³

³ Plaintiffs argue that the Court should dismiss their complaint only if “it appears beyond doubt that [the] plaintiff can prove no set of facts in support of his claim that entitle him to relief.” (Opp. at 5, citing a decision issued in 1997.) This is plainly wrong. The Supreme Court explicitly disavowed the “no set of facts” formula well over a decade ago. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) (“there is no need to pile up further citations to show that [the] ‘no set of facts’ language has been questioned, criticized, and explained away [T]his famous observation has earned its

C. Plaintiffs Fail To Plead A Claim Against Ameriprise Insurance Company Or Ameriprise Auto And Home Insurance.

Defendants showed in their opening brief that plaintiffs entered into a contract solely with IDS and that plaintiffs have alleged no factual basis for their claims against Ameriprise Insurance Company or Ameriprise Auto and Home Insurance. Plaintiffs respond that “the very first page of the policy clearly identifies [all] three entities in bold print,” and that this “indicates a common authorship of the policy.” (Opp. at 10.)

Plaintiffs are again wrong. The first page of the policy includes no reference at all to Ameriprise Insurance Company or Ameriprise Auto and Home Insurance and shows that the policy is a contract between plaintiffs and IDS only. (Dkt. No. 16-2 at 2.) Plaintiffs appear to be citing a different page: a cover page on which a representative of IDS authenticated the policy. (Dkt. No. 16-2 at 1.) Plaintiffs' point appears to be that the authentication page is written on letterhead that includes references to all three entities. But letterhead does not make Ameriprise Insurance Company or Ameriprise Auto and Home Insurance the "authors" of the policy. And even if plaintiffs were correct that the authentication page shows "common authorship," the question here is not who "authored" the contract but who is a *party* to the contract. *E.g., Lehrer v. DSHS*, 101 Wn. App. 509, 516 (2000) ("a plaintiff in a contract action must prove a valid contract *between the parties*, breach, and resulting damage") (emphasis added). Even plaintiffs do not allege that Ameriprise Insurance Company or Ameriprise Auto and Home Insurance are parties to the insurance policy from which all of their claims arise.

Plaintiffs also argue that the three entities share a website and a mailing address, and that they use the same marketing strategy. According to plaintiffs, these are indicia of “a centralized source of authority and common management.” (Opp. at 10.) But again, even if that were true, it would not show that plaintiffs have stated a claim against Ameriprise Insurance Company or Ameriprise Auto and Home Insurance. Plaintiffs cite no legal principle under which entities sharing “common management” are liable for one another’s torts or contractual obligations. In the absence

retirement"). This marked a significant development in federal pleading law, and received enormous attention from courts, commentators and lawmakers. *See, e.g.*, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1, 1 (2010).

1 of any such authority, plaintiffs have failed to state a claim against these two entities.

2 **III. CONCLUSION**

3 The Court should dismiss the complaint and this action in their entirety, with prejudice.

4 Dated: February 21, 2020

Respectfully submitted,

5 /s/ Robin Wechkin

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 21, 2020, I caused the attached document to be filed under
3 the CM/ECF rules for the United States District Court for the Western District of Washington. In
4 accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will
5 send e-mail notification of the filing to:

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